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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

12 MJ 3229 (PAC)

5 ROGER DARIN,

6 Defendant.

7 -----x  
8 New York, N.Y.  
9 June 23, 2015  
3:26 p.m.

10 Before:

11 HON. PAUL A. CROTTY,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the  
Southern District of New York

17 BY: DANIEL A. BRAUN

18 Assistant United States Attorney  
THOMAS B.W. HALL,  
19 U.S. Department of Justice,  
Criminal Division, Fraud Section

20 COVINGTON & BURLING, LLP (DC)  
Attorneys for Defendant

21 BY: BRUCE A. BAIRD

22 ALEXANDER A. BERENGAUT  
JAMES M. GARLAND

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(In open court)

THE COURT: Good afternoon. Please be seated.

(Case called).

MR. HALL: Good afternoon, your Honor. Thomas Hall,  
Daniel Braun for the United States.

MR. BAIRD: Your Honor, Bruce Baird for the defendant,  
Roger Darin.

THE COURT: Who's with you, Mr. Baird?

MR. BAIRD: Thank you, your Honor. Shall I begin,  
your Honor?

THE COURT: No. Who's with you?

MR. BAIRD: I'm sorry. Alex Berengaut and Jim  
Garland.

THE COURT: All right, Mr. Baird, go ahead.

MR. BAIRD: Thank you. Your Honor, Roger Darin is a  
Swiss citizen and is accused in the complaint filed in this  
court of one thing, of altering his opinion about the answer to  
hypothetical questions from the British Bankers Association  
about yen interest rates while working at a Swiss bank in  
Tokyo, Singapore and Zurich.

The only connection between Roger Darin and the United  
States is that the British Bankers Association used Roger  
Darin's opinions, together with many others, to calculate a  
so-called LIBOR fixing for yen, and that that fixing was  
published worldwide, including the United States.

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1           On these facts, for two simple reasons, the complaint  
2           against Roger Darin should be dismissed. The first reason is  
3           that on all variations of the test for when the U.S. can  
4           constitutionally charge a foreigner for acts done somewhere  
5           else --

6           THE COURT: But they're alleged to have occurred here  
7           in the United States, haven't they?

8           MR. BAIRD: I'm sorry, your Honor?

9           THE COURT: They're alleged to have occurred here in  
10          the United States. That's what the complaint charges.

11          MR. BAIRD: There's actually no allegation in the  
12          complaint, your Honor, that Roger Darin did anything in the  
13          United States. There's no connection between the United States  
14          and Roger Darin alleged in the complaint, apart from the  
15          publication of LIBOR. There are allegations involving  
16          Mr. Darin's co-defendant.

17          The complaint is in two parts. There's a very narrow  
18          allegation against Roger Darin, consisting only of his offering  
19          an opinion to the British Bankers Association, and there's a  
20          much broader set of facts alleged against his co-defendant,  
21          Thomas Hayes, among which are connections to the United States  
22          but those connections are not alleged to involve Roger Darin.

23          THE COURT: Well, I'm referring to Count One, the  
24          first paragraph in the complaint. It says that Mr. Hayes and  
25          Mr. Darin, the defendants, and others known and unknown,

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1 conspired to defraud and to obtain money, and they did that by  
2 using the wires in the United States. That's what the  
3 allegation is.

4 MR. BAIRD: Your Honor, that's not a factual  
5 allegation. That's not the allegation that is on --

6 THE COURT: That's the charge on which the arrest  
7 warrant was issued.

8 MR. BAIRD: Yes, your Honor. It's a charge that's not  
9 supported by the facts. In other words, your Honor, there's  
10 no -- your Honor has no obligation -- in fact, your Honor is  
11 really not allowed to accept as true mere legal allegations.  
12 They need to be factual allegations, and I can cite your Honor  
13 cases for that. There need to be factual allegations in the  
14 complaint. Those must be accepted as true.

15 The legal boilerplate at the beginning need not be  
16 accepted as true. Those are not factual allegations, and that  
17 if your Honor reads through the rest of the remainder of the  
18 counts, there's no allegation. In fact --

19 THE COURT: I know Two and Three are silent with  
20 regard to Mr. Darin.

21 MR. BAIRD: Well, they are, but even with respect to  
22 Count One, your Honor, the scheme as described -- and perhaps I  
23 can direct your Honor to the page. I apologize, your Honor.  
24 I'll just take a minute. I want to find the right page.

25 THE COURT: May I suggest 18 and 19 to you, Mr. Baird?

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MR. BAIRD: Those are some of the chats, your Honor.

On Page 7, your Honor, there is a description of the fraudulent scheme as charged. That's the charge in Count One.

THE COURT: At paragraph 19?

MR. BAIRD: Correct, paragraph 19, A, B and C.

THE COURT: Right.

MR. BAIRD: And there are three subparts. Subpart A is conspiring with Darin to cause the bank to make false or misleading yen LIBOR submissions to BBA. That's the only one that relates to Darin. That's the opinion.

Then it goes on, in B and C, to describe the remainder of the scheme. And those elements of the scheme, those parts of the scheme are alleged only to relate to Mr. Hayes. They're not alleged to relate to Mr. Darin at all.

So it is only the delivery of that opinion, the alteration of his opinion, at the insistence of Mr. Hayes, that Darin is alleged to have done. That's what's alleged to be his key part in this scheme.

THE COURT: So according to your theory, Mr. Baird, the Fifth Amendment applies?

MR. BAIRD: It certainly does, your Honor.

THE COURT: And that requires what, that the government show nexus and notice?

MR. BAIRD: Yes, your Honor. And, in particular, I'd like to focus on nexus. It needs to show --

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1 THE COURT: Before we get there, I want to talk about  
2 the fugitive disentitlement, as to why Mr. Darin is not a  
3 fugitive, or if he is a fugitive, whether I should exercise my  
4 discretion and say that somebody who is in Switzerland, is a  
5 Swiss citizen, a Swiss national, but refuses to come to the  
6 United States. Why should we be expending any time on  
7 considering the argument you're raising?

8 MR. BAIRD: Your Honor, first of all, he's not a  
9 fugitive. There's a clear statement of the test for when  
10 someone is a fugitive in Judge Chin's opinion, which we cite,  
11 In re Grand Jury Subpoena.

12 THE COURT: I don't think that Judge Chin's statement,  
13 though, completely exhausts the alternatives for fugitive  
14 status. It was sufficient for the Marc Rich case, but I don't  
15 think it was pretending to define what fugitive status was in  
16 other matters.

17 MR. BAIRD: Well, your Honor, I take your word for it.  
18 It looks to me like a broader test, but as I understand the  
19 test, and it corresponds with the reasons for the test. The  
20 reason for the fugitive disentitlement doctrine at all is  
21 because you don't want to expend the resources of this court,  
22 on somebody. Indeed, you want to penalize someone who flees  
23 from justice, who flouts the law. That's not what Mr. Darin's  
24 position is at all.

25 He's not someone who was here and committed a crime

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1 and then left, or fled from justice when he learned there was a  
2 crime. He's never fled anywhere. He's never gone anywhere.  
3 He's living where he's always lived. He's simply not a  
4 fugitive. The word has no meaning when applied to him.

5 THE COURT: There are cases, I think you would agree,  
6 that suggest you're a fugitive if you don't appear to respond  
7 to the charges that are made against you.

8 MR. BAIRD: Actually, your Honor, I think there are no  
9 cases. There's not a single case, that I believe I know of and  
10 there's no case that the government cites or that Magistrate  
11 Francis cites that holds that.

12 There are cases that use the word "return." If he's  
13 charged and he does not return, meaning that he committed the  
14 crime here, he then left, and he did not return to face the  
15 charges. There are cases like that on those facts, your Honor,  
16 but I believe there are not cases in which someone is overseas  
17 the whole time, who has never fled anywhere, never traveled  
18 anywhere, is not alleged to have traveled anywhere, is held to  
19 be a fugitive. I don't think there's a case like that, your  
20 Honor.

21 There are cases that use that word "return," and if  
22 you read them quickly and you're not thinking about what  
23 "return" means, you can reach the conclusion, as the government  
24 does, that these cases imply that you can -- that you must come  
25 to the United States in the first instance, even if you've

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1 never been here. I don't think there's a case that holds that,  
2 and there's no case that discusses that as a component of the  
3 fugitive doctrine.

4 THE COURT: So in your view, was Magistrate Judge  
5 Francis right?

6 MR. BAIRD: Well, your Honor, I think --

7 THE COURT: Or just partially right?

8 MR. BAIRD: He didn't decide -- actually, what he did,  
9 as I understood his opinion, he really didn't decide whether  
10 the fugitive disentitlement doctrine -- sorry whether Mr. Darin  
11 was a fugitive. He said assuming that he was.

12 THE COURT: He wouldn't apply --

13 MR. BAIRD: I, nevertheless, won't apply the doctrine.  
14 So I believe that's where he came out, and I think he certainly  
15 was right not to apply the doctrine, even assuming that your  
16 Honor was of the view that it applies because, again, Mr. Darin  
17 is going nowhere, has been nowhere.

18 Judge Francis made the explicit finding that Mr. Darin  
19 was disadvantaged by the situation he's in. He's been  
20 living -- he's been restricted to Switzerland for two years  
21 without any action on this case.

22 THE COURT: Why do you say he's restricted?

23 MR. BAIRD: He's restricted, your Honor, because  
24 there's an arrest warrant.

25 THE COURT: He can't go to Italy?



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1 MR. BAIRD: He can't go anywhere. His fiancé is  
2 Japanese, and he has relatives in Germany and has family in  
3 various countries and he can't go anywhere. That would be true  
4 for the rest of his life if this motion is not ruled on. His  
5 entire existence has been affected severely by this situation.

6 It's not the sort of situation in which the fugitive  
7 disentitlement doctrine was meant to embrace. He's not  
8 fleeing. This is a classic fugitive case. The case for which  
9 the doctrine was made is the case in which someone leaves; he  
10 is flouting the law. He's not -- not only commits a crime here  
11 and then flees, but he ignores the order to show up to court.

12 THE COURT: Why would I order him to show up in court?  
13 Would he show up in court?

14 MR. BAIRD: This is a case -- no, your Honor. This is  
15 a case in which he is not -- he cannot -- he's not willing to  
16 come to the United States because --

17 THE COURT: He wants to make all these arguments long  
18 distance, correct?

19 MR. BAIRD: He does, your Honor. Well, your Honor, I  
20 think he's entitled to do that.

21 THE COURT: That may be, but he's not submitting  
22 himself to the Court's jurisdiction, and I don't have control  
23 over the defendant. He's making these arguments from  
24 Switzerland.

25 MR. BAIRD: In a very real sense, your Honor does have

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1 control. You have control over the rest of his life. If these  
2 charges are well-founded, we don't believe they are, then your  
3 Honor has disadvantaged him for the rest of his life. I would  
4 say your Honor has great control. It's an extremely serious  
5 matter to him.

6 THE COURT: One thing that's, that was clear to me, at  
7 least from reading Magistrate Judge Francis' opinion, was his  
8 conclusion I think he reached in that Mr. Darin, under no  
9 circumstances, can come to the United States. Is that an  
10 accurate --

11 MR. BAIRD: Your Honor, I hesitate to predict the  
12 future, but --

13 THE COURT: In the present state, that's the present  
14 situation?

15 MR. BAIRD: That's the situation we're in right now.  
16 Yes, sir, your Honor.

17 THE COURT: I've been interrupting you. Now,  
18 Mr. Baird, why don't you go ahead.

19 MR. BAIRD: Your Honor, my most important function  
20 here is to answer your Honor's questions; so I want to make  
21 sure I do. This fugitive disentitlement doctrine is  
22 extremely -- we thought Judge Francis dealt with it well. So I  
23 did not mean to argue it, but if your Honor is pausing on that  
24 question, I want to really focus on it for a moment. I really  
25 think that it's --

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1 THE COURT: Well, maybe Magistrate Judge Francis is  
2 right. He said that he was not going to apply it because he  
3 thought that the other arguments about nexus and notice could  
4 not be maintained because of the allegations in the complaint.  
5 He thought that all of the requirements of the Fifth Amendment  
6 had been satisfied.

7 MR. BAIRD: Yes, your Honor.

8 THE COURT: Why was he wrong on that?

9 MR. BAIRD: Okay. Well, then let me go on to that.  
10 For two reasons. So the first reason is that on all variations  
11 of the test, and the test it is stated in various ways, for  
12 when the U.S. can constitutionally charge a foreigner for acts  
13 done somewhere else, that test is not met here based on the  
14 allegations against -- just against Roger Darin. I'll get into  
15 that test. I just want to tell your Honor the two points.  
16 That's the first point.

17 The second point is it's only the allegations against  
18 Roger Darin, not allegations against someone else -- in this  
19 case, the broader allegations against Thomas Hayes -- that can  
20 be used in determining jurisdiction over Roger Darin. Those  
21 are the two points.

22 So let me start with the first point, where the line  
23 is, what the test is to decide when it's fundamentally fair to  
24 charge someone, a foreigner, in this country for acts done  
25 somewhere else. There's no dispute that this is a

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1 constitutional due process issue. The Second Circuit believes  
2 you can't just charge someone overseas for acts done overseas.  
3 You have to find the minimum level of contact, the nexus  
4 between that person and the United States. That's true in a  
5 civil case. It's true in a criminal case.

6 Al Kassar is a main Second Circuit case on this point.  
7 It articulates the test. There must be a sufficient nexus, the  
8 court said there, between the defendant and the U.S. so that  
9 prosecuting him here would not be arbitrary or fundamentally  
10 unfair. And they go on to talk about what nexus is required.  
11 They say for a non-citizen -- this is the Second Circuit -- for  
12 a non-citizen acting entirely abroad, a jurisdictional nexus  
13 exists when the aim of an activity is to cause harm inside the  
14 U.S. as to U.S. citizens and interests.

15 Judge Francis said in his opinion that he didn't think  
16 this was the proper standard, and I believe he meant there that  
17 there are various ways to show aiming. Effects is another way,  
18 for substantial direct effects so that there's specific intent  
19 to one side. A reasonable person could expect to be haled into  
20 court in the U.S. In other words, the test is objective, not  
21 subjective. It depends on the surrounding facts and  
22 circumstances, and we agree with that. We don't dispute that.  
23 There are other cases for that proposition, and we cite some in  
24 our brief. Goldberg against UBS.

25 The key question in this case is what kind of intent

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1 or effects add up to a focus on the U.S. The facts and  
2 circumstances have to add up in some way to a focus on the U.S.  
3 as opposed to the world as a whole. So in the two cases cited  
4 by Judge Francis on effects, one of them is Yousef, an opinion  
5 by Judge Keenan, explicitly found that the defendant was aware  
6 that the conduct he was charged with would have an effect in  
7 the U.S.

8 And in Mostafa, another case they cite, the court  
9 explicitly found that the defendants targeted American  
10 interests; so again, a focus on the U.S. There are numerous  
11 civil cases in this circuit and elsewhere adopting that same  
12 aiming analysis. Leasco, for example, is a Second Circuit  
13 case, Judge Friendly, it's on all fours. The quote is: While  
14 worldwide reliance may, in some sense, be foreseeable, it is  
15 not sufficiently so to constitute a basis for personal  
16 jurisdiction consonant with due process.

17 And there are cases much closer than that In Re:  
18 Terrorist Attacks is another Second Circuit case, more recent,  
19 and there are two District Court cases this year, one from  
20 Judge Gardephe, one from Judge Daniels, both involving this  
21 exact situation. Financially, in a civil case, but financial  
22 institutions -- overseas financial institutions charged with  
23 manipulating LIBOR. And these cases both -- in both cases the  
24 complaints were dismissed. There was not sufficient nexus --

25 THE COURT: That's the long-arm statute, right?

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1 MR. BAIRD: Well, your Honor, it's the civil  
2 jurisdiction versus criminal, but the test is the same.  
3 Goldberg, for example, I commend to your Honor Judge Trager's  
4 opinion in Goldberg, which discusses that in a civil case, the  
5 way in which the tests for the civil and criminal due process  
6 are the same with one distinction, that in the criminal  
7 context, more due process is required. That is, the civil test  
8 is easier to satisfy. If you can't satisfy the civil test,  
9 there's no way you can satisfy criminal due process.

10 THE COURT: Well, Judge Francis disagrees with you.  
11 He said the complaint here alleges use of interstate wires in  
12 furtherance of a fraudulent scheme that underlies the charge of  
13 conspiracy against Mr. Darin. The co-conspirators purportedly  
14 caused the manipulated LIBOR he published to servers in the  
15 United States and used the United States wires to memorialize.  
16 So the culpable conduct underlying the substantive account,  
17 therefore, occurred in the United States.

18 You keep on talking about what Mr. Darin says. I  
19 think the standard is, the test is really what does the  
20 complaint allege.

21 MR. BAIRD: Well, no, your Honor. It has to be  
22 regarding this defendant. I think Judge Francis was mixing up  
23 two doctrines in cases that he cited in that too. There is a  
24 doctrine involving the extraterritorial application of the  
25 statute, and with respect to that doctrine, it's a statutory

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1 doctrine --

2 THE COURT: Doctrine of statute interpretation?

3 MR. BAIRD: Yes, your Honor. Whether the statute will  
4 be applied extraterritorially or not. For that purpose, you  
5 can look at the actions of all co-conspirators and other  
6 individuals, but that's not what we're talking about here.  
7 We're talking about personal jurisdiction over a particular  
8 person, and for those purposes, it is only the allegations with  
9 respect to that person that are relevant. That's the  
10 difference.

11 Those are two separate doctrines, and what I'm  
12 addressing here is the doctrine of personal jurisdiction. And  
13 the cases, there are criminal cases that say the civil test and  
14 the criminal test are the same test. Those are -- that's the  
15 same question that's being addressed. They're getting the same  
16 answer. The question is, is it fair to hale this person into  
17 court in the United States, this foreign person, who did things  
18 only overseas, is it fair to bring them here? And in judging  
19 whether it's fair to bring him here, the question is: What did  
20 he do? What are his connections? There's a Supreme Court  
21 case, last year --

22 THE COURT: Don't you think we ought to consider what  
23 he's charged with here?

24 MR. BAIRD: Your Honor, I think what he's --

25 THE COURT: Because whether it's fair or unfair

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1 depends upon what he did here.

2 MR. BAIRD: I agree.

3 THE COURT: What he's alleged to have done here.

4 MR. BAIRD: I agree with that completely, your Honor.

5 THE COURT: Well, why are the allegations insufficient  
6 here?

7 MR. BAIRD: Your Honor, there's the only allegation  
8 tying Mr. Darin to the United States is the publication of  
9 LIBOR all over the world, including here. There's no factual  
10 allegation in the complaint that relates to Mr. Darin and the  
11 United States. If you start talking about Mr. Hayes, then  
12 there are connections to the United States, and I'm going to  
13 get to that.

14 There's a test. That's my second point, that you  
15 can't use Mr. Hayes. What you have on Mr. Hayes, you can use  
16 that to get jurisdiction over Mr. Hayes, but if Mr. Darin is  
17 somebody overseas who has nothing to do with this country and  
18 he does something over there, you can't just grab him because  
19 you have something on other people.

20 THE COURT: We're more familiar with drug cases here.  
21 If somebody is dealing drugs in Colombia and stays in Colombia  
22 but the drugs end up here in the United States and there's a  
23 conspiracy charge, the person in Colombia doesn't have to be  
24 here.

25 MR. BAIRD: What happens in those cases, your Honor,



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1 is that there's a judgment made, opinions considered and  
2 discussed whether the people in Colombia, for example, know  
3 where the drugs are headed. They know that the United States  
4 is the place that's targeted. Those decisions actually  
5 explicitly talk about that subject, and that's part of -- those  
6 drug cases are some of the cases that are relevant here.

7 Klimavicius-Viloria, for example, in the Ninth Circuit  
8 is one of those. It involved ships and whether you can take  
9 jurisdiction over the --

10 THE COURT: Ships on the high sea.

11 MR. BAIRD: Yes.

12 THE COURT: The fast boats.

13 MR. BAIRD: And the consideration that was given was  
14 whether you could tell from the position of the ship and the  
15 amount of the drugs and various other criteria that their goal,  
16 their aim was the United States, and the court decided that,  
17 yes, you could. Those are all cases involving an aiming at the  
18 United States.

19 That's what we don't have here. We don't have  
20 anything like that with respect to Mr. Darin that suggest  
21 aiming at the United States. It's the reverse. There's not a  
22 shred of aiming at the United States. It's only worldwide for  
23 Mr. Darin.

24 He's not alleged to have traded at all. He's not  
25 alleged to have done anything except offer an opinion to the

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1 British Bankers Association from Tokyo or Singapore or Zurich,  
2 working for a Swiss bank. That's all he's alleged to have done  
3 factually in this complaint.

4 His co-conspirator is the guy who did everything.  
5 He's the one who traded. He's the one who is alleged to have  
6 sent wires, dealt with people in the United States, as well as  
7 otherwise, talked to other bankers. There's all kinds of stuff  
8 against him. He's on trial in the UK right now, this other  
9 individual, but Roger Darin is not part of that. And there are  
10 no allegations like that against him.

11 THE COURT: All right, Mr. Baird. If you don't mind,  
12 I'd like to hear from the government, and you can get a  
13 rebuttal of ten minutes. Okay.

14 MR. HALL: Thank you, your Honor. Your Honor, I think  
15 the Court has correctly identified what some of the factual  
16 allegations in this case are, but I think because this case  
17 only recently came to this Court, it is important to emphasize  
18 what's alleged in the complaint. And what's alleged in the  
19 complaint is Mr. Darin's participation in a worldwide scheme to  
20 defraud UBS counterparties across the globe in  
21 yen-LIBOR-related trades.

22 That's what's alleged. It's not just this narrow  
23 thing that Mr. Baird is talking about, the publication of the  
24 rate. He was alleged to participate in a conspiracy to  
25 manipulate yen LIBOR, to steal money from UBS counterparties

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1 across the world.

2 I was planning to address the issues of nexus, fair  
3 notice, extraterritoriality and fugitive disentitlement in that  
4 order, but I'm, of course, pleased to go wherever the Court  
5 would like.

6 THE COURT: Well, start with fugitive disentitlement,  
7 please.

8 MR. HALL: Of course, your Honor. I think an opinion  
9 that should be relevant to the Court's determination here is  
10 Judge Marrero's opinion in January 2015 in United States v.  
11 Buck. That was a very similar case to the one at bar today.  
12 It was a Swiss defendant charged with tax evasion, conspiracy.  
13 He perhaps set foot in the United States once during the course  
14 of the conspiracy, and he was abroad when he was charged.

15 He didn't come here, and Judge Marrero, just five  
16 months ago, said: I'm not going to hear your motion to set new  
17 bail conditions under the fugitive disentitlement doctrine. So  
18 to the extent that Mr. Darin is arguing there's no case where a  
19 judge has done it, there's a case from this courthouse in this  
20 year, and that's United States v. Buck.

21 I think the Court is correct too in identifying that  
22 what a fugitive is is not just defined by Judge Chin's opinion  
23 in the Marc Rich case. If you look, for instance, as the  
24 Second Circuit has, in Empire Blue Cross and Blue Shield, the  
25 Second Circuit looks at the definition of fugitive from Black's

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1 Law Dictionary. And one of the definitions of that, a fugitive  
2 there is a criminal suspect who evades prosecution.

3 That's what Mr. Darin is. No game of semantics is  
4 going to avoid what he is, and that is a person who is refusing  
5 to submit to the jurisdiction of this court. He's no different  
6 than Mr. Buck, and as Judge Marrero properly found, the Court  
7 shouldn't be hearing his arguments.

8 And beyond the Buck case, there are, in fact, cases  
9 where District Court judges across the country have said, I am  
10 not going to hear your argument on a motion to dismiss under  
11 exactly the same circumstances. These are cited in our brief,  
12 United States v. Yeh, a 2013 decision from the Northern  
13 District of California. The defendant there was in Taiwan.  
14 Wasn't going to show up in the United States. Fugitive  
15 disentitlement doctrine applied. In re: Han Yong Kim, that was  
16 a Ninth Circuit case. Ninth Circuit refused to issue a writ of  
17 mandamus. Similar circumstances, defendant in Taiwan.

18 There's no law that the United States is aware of that  
19 would prevent the Court from exercising its discretion more  
20 generally, not just under the fugitive disentitlement doctrine  
21 specifically, but more generally exercising its discretion in  
22 refusing to hear the motion of someone like Mr. Darin, who is  
23 refusing to appear here in court but, instead, is sending his  
24 lawyers in an attempt to get the charges against him dismissed.

25 I think Judge Francis went through the public policy

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1 factors underlying the fugitive disentitlement doctrine in his  
2 opinion, and I just want to touch on two of them here that the  
3 United States particularly disagreed with Judge Francis'  
4 analysis. One, is his, Judge Francis', finding that reaching  
5 the merits on Mr. Darin's motion would not encourage others in  
6 similar situations to flee from justice.

7 In fact, the Department of Justice has charged several  
8 defendants with extraordinarily similar conduct, LIBOR  
9 manipulation, who are in the same circumstance as Mr. Darin.  
10 They're in countries that have, to date, not extradited them,  
11 and you can be sure that they are watching these proceedings  
12 with great interest. And if the Court is willing to entertain  
13 motions from defendants abroad, those defendants will also come  
14 knocking on the Court's door, through their lawyers, to fill up  
15 the Court's docket with litigation that is not a useful use of  
16 the Court's time.

17 Second is the point about prejudice to the United  
18 States because of pretrial delay. This case was indicted or  
19 charged by complaint in December of 2012.

20 THE COURT: Why hasn't there been an indictment?

21 MR. HALL: Several reasons, your Honor. Well, one, as  
22 you've seen in our motion papers, we plan to ask a grand jury  
23 for an indictment in the near future. Two, we have not  
24 proceeded with an indictment in this case --

25 THE COURT: That doesn't explain what happened between

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1 2012 and 2015.

2 MR. HALL: Absolutely, your Honor. We were in  
3 communication with Mr. Darin's counsel prior to the charges,  
4 you know, during the pendency of the complaint, as well. And  
5 Mr. Hayes, as the Court knows, is being charged in the United  
6 Kingdom and so the United Kingdom authorities, not particularly  
7 excited about extraditing him back to the United States to face  
8 charges when he's facing charges there. In fact, as I  
9 understand their legal system, while he is charged there, he  
10 cannot be extradited here.

11 So, therefore, the United States didn't believe it was  
12 a good use of the grand jury's time to return an indictment  
13 against two defendants who were not going to present themselves  
14 in court. We understood from Mr. Darin's counsel, as he's  
15 represented today, that he will never show up in the United  
16 States. And so, therefore, we didn't think it was necessary.

17 However, we were surprised by Judge Francis'  
18 suggestion in his opinion that the United States was not  
19 interested in prosecuting this case and in moving it forward.  
20 Nothing could be further from the truth, and that's why we are  
21 going to go to the grand jury and ask for an indictment in the  
22 near future because we didn't expect the Court to misapprehend  
23 our intentions in that regard.

24 As to the prejudice to the United States, the United  
25 States is suffering prejudice by Mr. Darin's continued absence

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1 from the jurisdiction. Witnesses' memories fade as time goes  
2 on. These events were remote, are remote now and will only  
3 grow more remote with time, and so the United States is  
4 sustaining prejudice. So I think those two equitable factors  
5 weigh in favor of the Court declining to hear Mr. Darin's  
6 motion under the fugitive disentitlement doctrine.

7 Unless the Court has any more questions --

8 THE COURT: Go ahead. No. I think what Magistrate  
9 Judge Francis was thinking of, you know, why should he bother  
10 getting into the fugitive disentitlement doctrine because you  
11 intend to uphold the validity of the complaint and to allow the  
12 charges in the arrest warrant issued to remain standing; so why  
13 should he bother. So I think that's the next big thing. Is  
14 the complaint valid under the Fifth Amendment, and is the  
15 arrest warrant issued pursuant to these charges; is that valid  
16 as well?

17 MR. HALL: Absolutely, your Honor.

18 THE COURT: So as Mr. Baird points out, the  
19 allegations with regard to Mr. Darin seem thin.

20 MR. HALL: We would disagree with that  
21 characterization, of course, your Honor. We think that the  
22 complaint is absolutely valid under both the presumption  
23 against extraterritoriality, that's more of a statutory  
24 argument, but more significantly, I think --

25 THE COURT: Do we have to even worry about

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1 extraterritoriality in light of the allegations that the fraud  
2 was committed using the wires in the United States?

3 MR. HALL: No, and I notice the defense didn't even  
4 address that in their reply brief.

5 THE COURT: Well, maybe Mr. Baird didn't have enough  
6 time.

7 MR. HALL: Well, that's possible, or enough pages.  
8 But I think the Court is absolutely correct as to  
9 extraterritoriality. This case, as alleged, is a domestic  
10 application of the wire fraud statute, and under firm Second  
11 Circuit precedent in Kim, Trapilo, Gilboe, this is a domestic  
12 application of the wire fraud statute.

13 We don't even have to discuss extraterritoriality. We  
14 don't have to discuss Morrison, we don't have to discuss RJR  
15 Nabisco because, as alleged, it's a domestic application of  
16 that statute. Full stop. End of story.

17 But Mr. Baird spent more time on the nexus issue, and  
18 then the corresponding Fifth Amendment issue of notice. And on  
19 the nexus point, I think it's important to recognize from the  
20 outset that this is an extraordinarily high burden for a  
21 defendant.

22 In fact, there are only two cases, of which the United  
23 States is aware, where a court has found that the United States  
24 failed to demonstrate nexus. One of those was United States v.  
25 Perlaza in the Ninth Circuit. That was on appeal, and that was



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1 a strange procedural posture because the United States, at the  
2 trial court, was not even allowed to present evidence of nexus  
3 as the one subset of defendants.

4 And so when the Ninth Circuit said you need to present  
5 some evidence of nexus here, it wasn't because of some sort of  
6 failure below, it was because the United States had not even  
7 been allowed to present that evidence.

8 The other case on this, where a court has found a lack  
9 of demonstrated nexus, is the United States v. Sidorenko case,  
10 the very recent case by Judge Breyer in the Northern District  
11 of California. As far as the United States is aware, that's  
12 the only case where a judge has granted a motion to dismiss on  
13 nexus grounds pretrial.

14 And the Sidorenko case is easily distinguishable from  
15 the case at bar here. No interest rates published in the  
16 United States in Sidorenko. No wires into the United States in  
17 Sidorenko. No victims in the United States in Sidorenko. It's  
18 an entirely different case. It's not a domestic application of  
19 a wire fraud statute, for one thing, and it just does not have  
20 nearly the same facts that we're looking at here.

21 Two kind of other initial matters as to the nexus  
22 requirement. Nexus is not a pleading requirement. There's no  
23 case that says that. There's no case cited by the defense that  
24 supports that, and Judge Breyer in Sidorenko seems to assume  
25 it, but does not explain where that law comes from, whether

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1 it's a pleading requirement or not. Sidorenko is only an  
2 outlier in that regard.

3 There are no other cases that even suggest that nexus  
4 is a pleading requirement. And the touchstone of nexus is, is  
5 the prosecution here arbitrary or fundamentally unfair? I  
6 think the Court is right on when analogizing this case to a  
7 Colombian drug distribution conspiracy. If someone is in  
8 Colombia and doesn't, himself -- his actions don't touch the  
9 United States directly, but he is aware that his  
10 co-conspirators will be importing cocaine into the United  
11 States, it is not arbitrary or fundamentally unfair for that  
12 person to be prosecuted.

13 THE COURT: Are you suggesting that nexus is an  
14 adequate requirement?

15 MR. HALL: No. Oh, absolutely not, your Honor. Nexus  
16 is a requirement. I will point out, however, that it is highly  
17 unusual and, in fact, I'm aware of no reported case, where a  
18 domestic application of a statute, like the wire fraud statute  
19 here, in a case like that where a court has done this nexus  
20 importing. That's why most of the nexus cases have to do with  
21 stateless vessels in the high seas or terrorism cases, for  
22 instance, where the conduct is all abroad.

23 There is, I think, an open question of whether you  
24 even need to do the nexus analysis here because of the domestic  
25 nature of the crimes alleged. However --

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1 THE COURT: If I were to insist, though, on finding a  
2 nexus requirement, where would it be satisfied within the  
3 complaint as it exists now?

4 MR. HALL: I think in a variety of ways. I think the  
5 touchstone of this analysis is Al Kassar, which I think is  
6 properly identified by both parties, where it says that an  
7 aimed harmed U.S. interest was sufficient for this nexus. Then  
8 there are other case that suggest -- for instance, Judge  
9 Forrest recently in the Mostafa case said that whether those  
10 acts could be expected to or did produce an effect. Judge  
11 Keenan made a similar observation in the 2010 Yousef case, did  
12 they produce an effect in the United States.

13 There's no question, based on the allegations in the  
14 complaint, that Mr. Darin's conduct, along with the conduct of  
15 his co-conspirators, produced effects in the United States.  
16 The publication of the manipulated interest rate data, that  
17 affected the millions of transactions here in the United States  
18 that are tied to these benchmark interest rates.

19 The manipulation of that interest rate data affected  
20 counterparties, UBS's counterparties here in the United States  
21 as alleged in the complaint. These are U.S. companies doing  
22 business, doing trades with UBS, who are being cheated out of  
23 their trades, out of money on their trades because UBS and  
24 Mr. Hayes and Mr. Darin are manipulating interest rates to  
25 which those trades are tied.

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1           His conduct absolutely could be expected to and did  
2     produce an effect in the United States. He was aware that his  
3     conduct would have such an effect as an experienced UBS trader,  
4     working hand in hand with Mr. Hayes, who was a global trader.  
5     Certainly no question in his mind that manipulating this  
6     interest rate would have effect on counterparties around the  
7     world, including in the United States, and most especially in  
8     New York City, the financial capital of the globe. It couldn't  
9     have been a surprise to him.

10           THE COURT: Does the complaint allege that?

11           MR. HALL: The complaint alleges that he was an  
12     experienced yen LIBOR trader. He was a yen LIBOR trader. It  
13     alleges that he, himself, was trading. It alleges that he was  
14     helping Mr. Hayes in a conspiracy. If you look at paragraph  
15     19, it alleges that he was participating in a conspiracy to  
16     manipulate yen LIBOR in a direction favorable to Hayes'  
17     positions, that Mr. Hayes was aiming to defraud UBS's  
18     counterparties and globally impact transactions in financial  
19     products tied to yen LIBOR. I'm looking at paragraph 20 now,  
20     your Honor, on Page 7. The counterparties entering into these  
21     derivative trades with Hayes did not know about the  
22     manipulation, were deceived.

23           THE COURT: What about the argument that Hayes doesn't  
24     count here, you have to look at the allegations with regard to  
25     Mr. Darin? Hayes may very well be a wrongdoer and may be

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1 subject to jurisdiction, but that doesn't have anything to do  
2 with Mr. Darin, according to the argument.

3 MR. HALL: I understand, your Honor. I think  
4 Magistrate Judge Francis hit the nail on the head here because  
5 the case on which Mr. Darin is most closely, most heavily  
6 relying on is the United States v. Perlaza case. And  
7 Magistrate Judge Francis devotes a lot of time to this in his  
8 opinion, pages 27 through 29 in his opinion, and I think very  
9 carefully parses the facts and the ruling there.

10 And where the Ninth Circuit did say that nexus  
11 determinations need to be made for each defendant, in the  
12 context of that opinion, that is not a huge surprise because,  
13 as I explained earlier, what would happen at the District Court  
14 level is the court had said -- again, there are two sets of  
15 defendants in Perlaza, the fast-boat defendants and the  
16 defendants on a boat called the Gran Tauro.

17 THE COURT: It's the mother ship.

18 MR. HALL: Exactly, your Honor. And what the court  
19 had said, the District Court had said, is that it's the  
20 fast-boat defendants were on a stateless vessel, no nexus  
21 requirement exists. And he then imputed that to the Gran Tauro  
22 defendants and said the United States did not need to prove  
23 nexus as to those defendants.

24 On appeal, the Ninth Circuit found two problems with  
25 that. It said, as to the fast-boat defendant, the court needed

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1 to let the jury answer that question, and as to the Gran Tauro  
2 defendants, because the jury needed to make the decision on the  
3 stateless vessel, over here, the United States had failed to  
4 prove nexus as to the Gran Tauro defendants. And so it  
5 reversed and remanded and said this needs to be proven down  
6 below.

7 Now, what that opinion didn't say, it does not say, is  
8 that in considering the nexus analysis, the court can't look to  
9 the scope and aims of the conspiracy. And as the Court well  
10 knows, a position like that, in the Ninth Circuit or elsewhere,  
11 would be at odds with decades of established conspiracy law  
12 that the actions of one co-conspirator can generally be imputed  
13 to others.

14 There's so many stages of the criminal process,  
15 ranging from the very beginning of the case, all the way  
16 through sentencing, where co-conspirators are on the hook for  
17 their co-conspirator's actions. It would make no sense that,  
18 in considering nexus, the court could not consider the aims,  
19 the scopes, the plan, the actions of the conspiracy as a whole.  
20 That's not what Perlaza stands for.

21 And Mr. Darin is attempting to twist, I think, the  
22 court's words in Perlaza to his own end, and Magistrate Judge  
23 Francis I think properly recognized that in finding that he  
24 could consider the co-conspirator's actions, Mr. Hayes'  
25 actions, in considering whether Mr. Darin's conduct as part of

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1 a conspiracy had a nexus to the United States.

2 THE COURT: Take three or four minutes and sum up the  
3 other areas.

4 MR. HALL: Sure, your Honor. One point that I did  
5 want to hit before I sat down today was the point of minimum  
6 contacts, and Mr. Baird mentioned that briefly about civil  
7 cases and --

8 THE COURT: Your point is simply that's not the  
9 standard?

10 MR. HALL: That's correct, your Honor. That's what  
11 Magistrate Judge Francis found. You know, in the reply brief  
12 the defense accuses the United States of being disingenuous on  
13 this point. If we are being disingenuous, Magistrate Judge  
14 Francis may be being disingenuous as well because what he had  
15 to say was --

16 THE COURT: You better not say that.

17 MR. HALL: Yes, I would not say that either. The law  
18 of personal jurisdiction is not relevant. He said that the use  
19 here would be inappropriate, and that's the United States'  
20 position too. As the Court well knows, with a full criminal  
21 and civil law docket, criminal law is not the same as civil  
22 law.

23 Civil personal jurisdiction law is not some sort of  
24 lower bar that is then raised and ratcheted up when a criminal  
25 defendant enters the courtroom. They are different standards.

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1 It's not the higher standard using the same scale. There are  
2 different plaintiffs, there are different processes, different  
3 purposes, different procedures.

4 It's just different when a sovereign is protecting its  
5 citizens from fraud, as opposed to when a court is trying to  
6 decide whether one plaintiff can hale a foreign defendant into  
7 that particular court.

8 Indeed, I think it's safe to say that adopting Judge  
9 Friendly's formulation in Leasco, this worldwide reliance  
10 formulation, would result in the perverse outcome that  
11 Magistrate Judge Francis identified, which is the broader a  
12 criminal scheme, the more global a criminal scheme, the less  
13 the United States could do to prosecute it. That's not good  
14 law and that's not good policy, and that shouldn't be the  
15 result here.

16 Very briefly on nexus -- I'm sorry, on notice, the  
17 standard is easily met here. That's what Judge Francis said.  
18 I don't think with need to spend a lot of time discussing  
19 notice because I think it's a fairly clear issue.

20 This was a creative way to steal money from victims.  
21 Manipulating LIBOR, yen LIBOR in this way was a clever way to  
22 steal money from these counter-party victims, but it wasn't one  
23 that implicates Fifth Amendment notice principles because  
24 Mr. Darin was on notice that this conduct could be considered  
25 criminal somewhere, and that's all the Fifth Amendment requires



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1 in the notice context.

2 THE COURT: Thank you very much.

3 MR. HALL: Thank you, your Honor.

4 THE COURT: Mr. Baird?

5 MR. BAIRD: Your Honor, let me try to do several  
6 things very quickly. I know your Honor's time is short. On  
7 fugitive disentitlement, I would say two things. The  
8 government identified a case that they did not cite in their  
9 brief called Buck, and if your Honor is interested in that --

10 THE COURT: Buck is cited.

11 MR. BAIRD: That's what -- yes, that's the name that  
12 they used. If your Honor would like something additional on  
13 that, we'd be glad to provide --

14 THE COURT: No, I think that, if I can find the cite,  
15 it is cited in the brief.

16 MR. HALL: Your Honor, if I may, I believe it's cited  
17 in Judge Francis' opinion, but I don't believe it's cited in  
18 the United States' brief.

19 THE COURT: That's right.

20 MR. BAIRD: In Buck, I believe the facts were and the  
21 government I think just identified --

22 THE COURT: Excuse me, Mr. Baird. Buck is cited in  
23 Magistrate Judge Francis' opinion at Page 10, where he says:  
24 Failure to surrender to authorities, once he learns that  
25 charges against him are pending. At least that's his approved

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1 definition of a fugitive.

2 MR. BAIRD: Thank you, your Honor. In any event, the  
3 government stated when they were up here that, in that case,  
4 the defendant had been in the United States during the  
5 conspiracy.

6 THE COURT: Yes, they did.

7 MR. BAIRD: That's the point, and that's the same fact  
8 pattern in every other case that they cited to. If your Honor  
9 looks at those cases, you will find that to be the fact  
10 pattern. What Judge Chin said the rule was -- I don't take  
11 these words to be just in this case -- he says, one cannot be a  
12 fugitive in these circumstances unless, one, he was present in  
13 the jurisdiction at the time of the crime; two, he learns,  
14 while he was outside, that he was wanted; and three, he then  
15 fails to return.

16 THE COURT: That's certainly Marc Rich.

17 MR. BAIRD: That seems like a category, yes.

18 THE COURT: He didn't have to define anybody else  
19 other than Marc Rich, who was the party before him.

20 MR. BAIRD: I understand, your Honor. And, of course,  
21 the judges are not required to say anything broader than the  
22 case before them, but Judge Chin, here, does say something that  
23 appears to be broader than the case before him, and it's  
24 something that is consistent with all other cases that we're  
25 aware of. So let me just make that one point about the test.

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1 THE COURT: Yes, sir.

2 MR. BAIRD: Then on discretionary choice that the  
3 judge made, I'd say this, in addition. There are discretionary  
4 factors to show how deserving Roger Darin is of the decision.  
5 One discretionary factor is the doctrine is penalty for  
6 flouting judicial process. I submit that Mr. Darin has not  
7 flouted anything. He stayed where he lived. He's not done  
8 anything.

9 It's to discourage flights from justice. Mr. Darin  
10 has not fled anywhere. It's to avoid prejudice caused by  
11 defendants' escape. He's not escaped from anywhere. Those are  
12 the reasons for the doctrine, and I submit, Your Honor, that  
13 Roger Darin is deserving on the merits of a decision here and  
14 not of being left without a decision.

15 Let me talk briefly --

16 THE COURT: What do you mean left without a decision?  
17 He's going to get a decision one way or the other. Magistrate  
18 Judge Francis did decide. He decided against him.

19 MR. BAIRD: Yes, your Honor.

20 THE COURT: And you're objecting to that, and I'm  
21 considering those objections.

22 MR. BAIRD: Yes, sir.

23 THE COURT: But there will be a decision on this  
24 matter, one way or the other.

25 MR. BAIRD: What I mean is, your Honor, if your Honor

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1 decides that, at the end of the day, Mr. Darin is not entitled  
2 to have his case decided because of the fugitive disentitlement  
3 doctrine, that would be a decision not to rule on the merits,  
4 but let me put that to one side.

5 I have two points on this, your Honor. First is this  
6 worldwide reliance. The government has no cases, there are no  
7 cases saying that if someone does not aim at the United States,  
8 but only at the world, that that's good enough for the nexus.  
9 There's no case like that. There's no case that says that.

10 There are cases, mostly civil cases, but they're cases  
11 that say it's not good enough. There are no criminal cases  
12 that say it is good enough. There are lots of civil cases that  
13 say it's not good enough, and there's at least one criminal  
14 case, Perlaza, with the big boat and the small boat, as your  
15 Honor pointed out. And the small boat -- the big boat was said  
16 to be an aider and abettor of the small boat, and the judge  
17 decided, no, you had to look at independently the nexus of the  
18 big boat. You can't just take the fact that they were aiding  
19 and abetting the smaller boat and that would be good enough.

20 There's a particularity to the inquiry. There needs  
21 to be an examination of this defendant, what's been alleged  
22 against him, and there needs to be an aim at the United States.  
23 Those are the two points. And there's no case, the government  
24 has no case to say that worldwide reliance is enough, that you  
25 don't have to aim at the United States. Instead, all of the

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1 cases talk about aiming at the United States, civil and  
2 criminal cases, including civil cases that are directly on  
3 point.

4 There's no good reason not to use those civil cases  
5 because they're answering the same question. They're using the  
6 same analysis. There are criminal cases that talk about the  
7 analysis of these civil cases and talk about how it's relevant,  
8 how they are answering the same questions. It's not different.

9 The government starts to talk about protecting its  
10 citizens from fraud. I submit, your Honor, that's avoiding the  
11 issue. This is a person, this is an individual who's overseas,  
12 who's done nothing here, who's alleged to have done very little  
13 and nothing in the United States. The government is here  
14 saying to your Honor, well, worldwide is enough. We admit  
15 there's a nexus that's required because they can't deny that,  
16 but somehow, anything will satisfy it, the world.

17 He can be overseas and have had nothing to do with the  
18 United States and have activities that affect the whole world  
19 similarly. That's a recipe for prosecuting everybody  
20 everywhere in the world if they're involved in something on the  
21 Internet, for example, that affects the United States, as well  
22 as other countries. There's no limit to that, and the United  
23 States suggests no limit.

24 I submit, your Honor, that a nexus is required, and  
25 with all the cases, no matter what differences they may have,

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1 what all the cases end up saying is that an aim at the United  
2 States, as opposed to somewhere else or the whole world, is  
3 what's required. And to decide that, this is my point too, it  
4 needs to be the facts relating to this defendant.

5 THE COURT: But there's a worldwide market for yen,  
6 isn't there?

7 MR. BAIRD: Well, your Honor, I think there is --

8 THE COURT: Then if it's a worldwide market, why,  
9 because the government doesn't say it had a particular impact  
10 in the United States, is there a failure of jurisdiction?

11 These fellows are trading round the clock in a  
12 currency that goes around the world and, you know, so surely  
13 some of it must stop off here in the United States.

14 MR. BAIRD: Your Honor, first of all --

15 THE COURT: And it fails because they didn't say it  
16 stopped off in the United States?

17 MR. BAIRD: No, your Honor. Mr. Darin is not alleged  
18 to have traded anything. He's alleged to have given an  
19 opinion. His part in this crime is giving an opinion, is  
20 altering an opinion that he gives to the British Bankers  
21 Association. His trading -- he is a trader, but his trading  
22 has nothing to do with the charges. This is about Thomas  
23 Hayes' trading.

24 Roger Darin's trading doesn't have anything to do with  
25 it. Judge Friendly, in the Leasco case, and the government

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1 said and Judge Francis said these cases are irrelevant. I  
2 submit, your Honor, they're anything but irrelevant. This is  
3 the same analysis, whether it's a criminal case or a civil  
4 case. You sit down and think to yourself, when is it fair to  
5 hale someone from overseas into a court in the United States,  
6 you're answering the same question.

7 The government doesn't get a lower bar because it's a  
8 criminal case. I think that's outrageous. If anything, it's a  
9 higher bar, but it's certainly not anything like the reverse.  
10 Indeed, if the civil case -- if the civil standard can't be  
11 met, what does that say about what the government is proving?  
12 And there are lots of civil cases. There are not just a  
13 couple, there are lots of them, and Judge Friendly's opinion  
14 in --

15 THE COURT: Usually in these cases, Mr. Baird, there's  
16 a hearing of some kind where the parties come in and submit --

17 MR. BAIRD: Some there are and some there aren't, your  
18 Honor. In 7 West 57th, and Laydon v. Mizuho, very recent  
19 cases, involving LIBOR, involving this exact situation, one  
20 involving yen, the other involving dollar LIBOR, Judge Gardephe  
21 and Judge Daniels dismissed complaints on this very ground  
22 because, No. 1, there was no effect on the United States other  
23 than this worldwide financial market, and No. 2, the facts  
24 alleged as to co-conspirators could not be used against the  
25 foreign bank who was making the argument.

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1           In other words, you couldn't say because there were 16  
2 banks involved in LIBOR, some of them did have effects in the  
3 United States. You could use that to charge those banks, to  
4 get jurisdiction over those banks but you couldn't use it  
5 against banks who had no contacts with the United States.  
6 Those two opinions are on all fours.

7           The only way to avoid this -- This is what the  
8 government is trying desperately to do here, your Honor.  
9 They're trying to -- the combination is, this is a big fraud;  
10 so, my gosh, you can't worry too much about jurisdiction. So  
11 let's not worry about the civil cases, which are dispositive,  
12 if your Honor considers them. And your Honor must consider  
13 them or should consider them because they are using the same  
14 analysis. And, again, I point -- actually, Judge Trager, I  
15 don't know if you knew Judge Trager.

16           THE COURT: I did.

17           MR. BAIRD: He was a careful --

18           THE COURT: Careful and thorough scholar.

19           MR. BAIRD: Yes, your Honor.

20           THE COURT: First-rate lawyer.

21           MR. BAIRD: I agree, your Honor. I served with him on  
22 the State Bar Ethics Committee years and years ago, and I found  
23 that to be the case myself.

24           THE COURT: He's responsible for many well-qualified  
25 judges. He was the chairman of Ed Koch's independent screening



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1 committee for the judiciary; so I know him well.

2 MR. BAIRD: I commend to you his decision in Goldberg  
3 against UBS. He considers some of these questions. He  
4 considers, in particular, the degree in which the civil  
5 standard and the criminal standard are really the same  
6 standard. They're talking -- they're asking the same question,  
7 and they're answering in the same way, and talks about the need  
8 for aiming at the United States.

9 These are really not separate streams of authority.  
10 It's not a situation in which you can toss the civil cases, and  
11 it's not as if the criminal cases are diametrically opposed  
12 either. What the government does is first it gets rid of the  
13 civil cases. It doesn't consider them. And as to the criminal  
14 cases, it analogizes from some cases that really aren't talking  
15 about this issue.

16 They talk, and I think the government here today  
17 talked about this today again, of domestic versus  
18 international. The cases they cite in their brief and the  
19 cases Judge Francis cited in his opinion, are not nexus cases.  
20 He cited for the proposition that you can look at the actions  
21 of a co-conspirator, he cited a case like Manuel. It's a case  
22 of Judge Lynch, a fine judge, but Judge Lynch was not talking  
23 about personal jurisdiction or nexus. His opinion had nothing  
24 to do with that. He was talking about the statutory, the  
25 extraterritorial application of the statute. So it was a

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1 different question. And for that purpose, as we concede and  
2 agree, you can look at the actions of co-conspirators.

3 And the other case he cites is Mostafa, which is a  
4 case, like Klimavicius, in which there's no separate  
5 consideration of the different co-conspirators, but that's  
6 because they're all on the same boat. In Klimavicius, for  
7 example, they're all literally on the same boat. They're on  
8 the same ship, and so the factors that are relevant to  
9 jurisdiction are the same for everybody on that ship.

10 There aren't -- so short way of saying that, there  
11 aren't cases that say you can use the facts that are alleged  
12 against others to find jurisdiction against the person in front  
13 of you. And the Supreme Court spoke on this in a civil case  
14 last year, Walden against Fiore. They italicized the  
15 "himself." You must use the acts relating to this individual  
16 himself.

17 THE COURT: What's the name of the case?

18 MR. BAIRD: Walden against Fiore.

19 THE COURT: Okay, yes.

20 MR. BAIRD: So, your Honor, I submit, if you look at  
21 these and get past the government's broad brush, look at the  
22 safety of the United States, worldwide fraud and you focus on  
23 an individual, there's an individual out there who doesn't have  
24 anything to do with the United States, and I'm not asking your  
25 Honor here to consider the notice requirement that's on our

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1       briefs, the extraterritorial application of the statute that's  
2       in our briefs, but there's only one point that I'm making here  
3       today and that is this nexus requirement.

4               There is no nexus here. There's nothing but  
5       worldwide, an effort to say it's the whole world, there's no  
6       difference. It can be Africa, it can be Siberia, it can be  
7       United States. They all have LIBOR. They can all trade LIBOR,  
8       and so you can prosecute them in the United States. That's  
9       just -- that's not right, and as soon as China starts doing it,  
10      maybe we'll change our mind about how broad these efforts  
11      should be. I submit the government is overreaching to try to  
12      even bring this case against Roger Darin.

13             THE COURT: Okay.

14             MR. BAIRD: If they've got something more, they can  
15      put it in the indictment. I'd love to see it, your Honor. I  
16      don't think they can, but in the meantime, I'd request your  
17      Honor prayerfully to consider this on the cases that exist on  
18      this.

19             THE COURT: I'll do that. I'll read all your briefs  
20      very carefully. I'll have a decision for you shortly. Thank  
21      you very much.

22             (Adjourned)